SUPREME COURT, U.

IN THE

Supreme Court of the United

OCTOBER TERM 1970

No. 1676

BILL J. GAMBOCZ,

Petitioner,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER,

Respondents.

On Petition for Writ of Certiorari

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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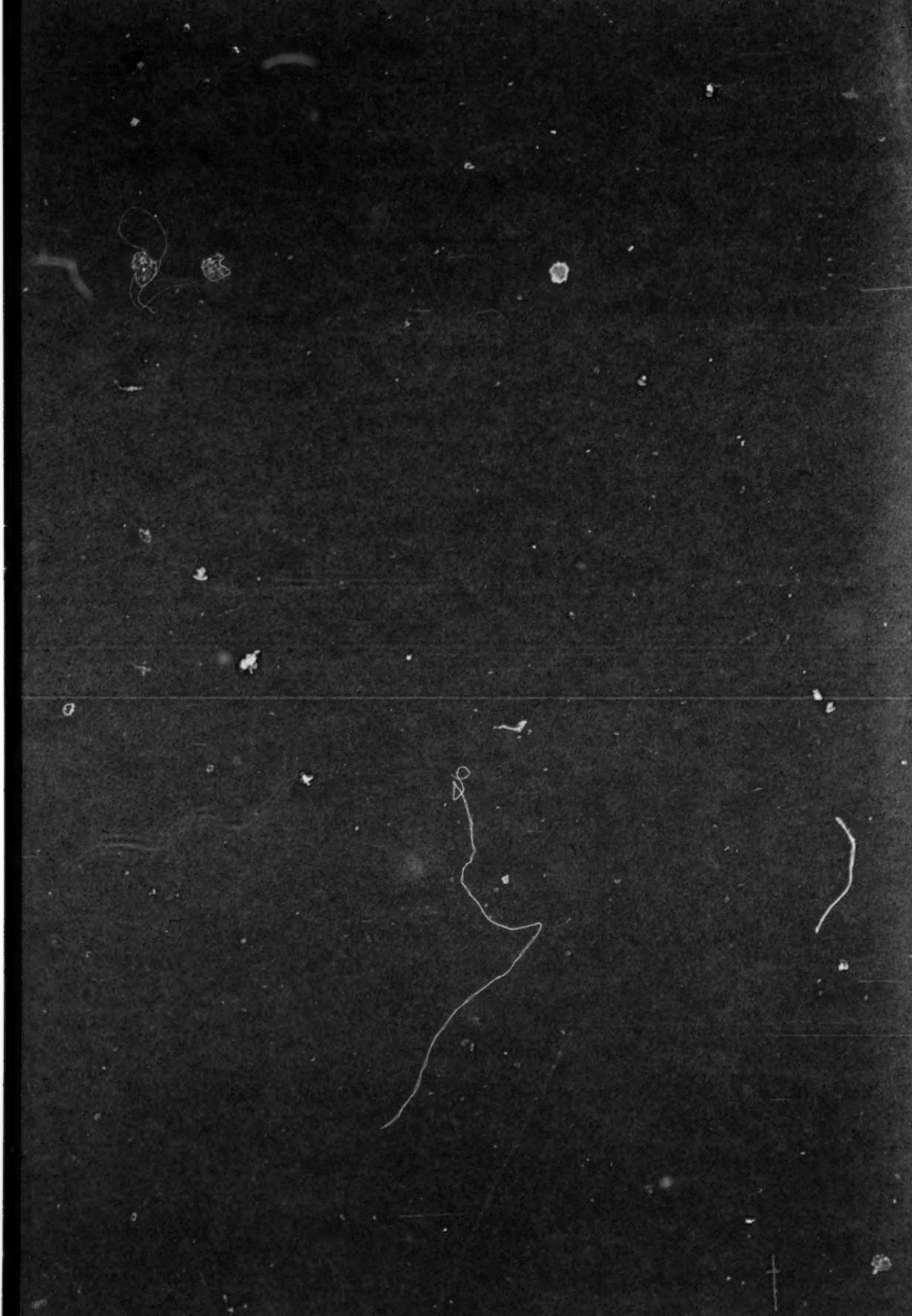

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Counter-Statement of Constitutional Provisions Involved

There are no consitutional provisions involved.

Counter-Statement of the Questions Presented

1. Does the petition present special and important reasons for review on certiorari?

2. Does the petition present any cognizable questions for review?

3. Did the Circuit Court of Appeals abuse its discretion when it affirmed the judgment of the District Court, denying the plaintiff relief under Rule 60(b) from a final order entered some 19 months previously, particularly under the unique and somewhat unprecedented circumstances of this case and the multiplicity of litigation surrounding it?

Counter-Statement of the Case

The petitioner is or was an insurance agent or broker. In 1964 he had business dealings with the respondent, Marie Keller, and her husband, Leroy Keller, now deceased, in connection with which the petitioner issued a check to Keller on May 26, 1964. Within a few days after receiving the check, the respondent Keller went to Europe where her husband was stationed while on military duty, and deposited the check for collection. The check was ultimately returned to Keller because of insufficient funds in the petitioner's account. Keller and her husband made several attempts to have the petitioner make good on the check, but petitioner failed or refused to do so.

In August 1965 the respondent Keller returned to this country after the death of her husband. She then commenced criminal proceedings against the petitioner for having issued a check without sufficient funds on deposit to cover its payment upon presentment. Thereafter, the

petitioner apparently contacted Keller, either personally or through his New Jersey attorneys, Holley and Kroner, and requested that she withdraw the charge and accept payment on the check. The petitioner then delivered to Keller, a general release which he had signed on September 25, 1965. The release was notarized and acknowledged as having been voluntarily made by the petitioner before Lee A. Holley, Esq., who was then his attorney.

Subsequently, on March 8, 1966, the petitioner commenced a civil suit for damages in the Superior Court of New Jersey, Law Division, Middlesex County, against Lillian Apel, Court Clerk of the Municipal Court of the Township of Edison; John W. Ellmyer, Jr., Chief of Police of Edison Township; George Miller, Richard McGinnis and Theodore C. Woerner, Police Officers of Edison Township; and the Township of Edison, a New Jersey municipal corporation (R1a). The first count of the petitioner's complaint alleged an abuse of process and/or a malicious prosecution arising out of the criminal proceedings involving the check for insufficient funds, while the second count alleged a conspiracy among the defendants in furtherance of the tortious conduct pleaded in the first count. All of the defendants answered the complaint, and denied its allegations. The case subsequently proceeded through an extensive and thorough discovery period and a pretrial conference, as required by the New Jersey Court Rules.

The case was tried in April, 1967, and resulted in a mistrial. A second trial commenced September 25, 1967, and that trial resulted in the entry of an order for judgment in favor of the defendants and against the plaintiff at the conclusion of the plaintiff's proofs. See *New Jersey Court Rules*, Rule 4:40-1.

Thereafter, petitioner appealed the adverse judgment to the Superior Court of New Jersey, Appellate Division, and that court, in a reported opinion, unanimously affirmed the result below. See *Gambocz* v. *Apel, et al.,* 102 N. J. Super. 123 (App. Div. 1968). Thereafter, the petitioner filed a petition for certification with the Supreme Court of New Jersey and this petition was denied on September 17, 1968. See *Gambocz* v. *Apel, et al.,* 52 N. J. 485 (1968). Thus, it is fair to say that with regard to the operative facts and transactions which were or could or should have been set forth in the complaint with which the petitioner instituted his action in the Superior Court of New Jersey, the petitioner obtained a trial on the merits, including subsequent appellate review of the results of that trial, in complete accordance with the rights granted him under the New Jersey Constitution. The sum and substance of the outcome of the New Jersey Superior Court litigation is summarized in the last sentence of the Appellate Division's opinion, *supra* 102 N. J. Super. at p. 133:

> "*A fortiori,* there is no reasonable basis to permit a jury to find that defendants collectively engaged in any conspiracy to harm the plaintiff."

Not content with the adverse determination rendered by the New Jersey courts on the merits of his claim, on January 3, 1968 the petitioner filed a complaint in the United States District Court, District of New Jersey (R9a), which complaint commenced the action for which petitioner now seeks review on certiorari. The law firm of Holley and Kroner represented the petitioner in this action, as it had represented him previously in the New Jersey Superior Court action.

An analysis of the complaint in the action now under review will reveal that it is based upon the same opera-

tive facts and transactions which served as the basis of the action previously commenced in, tried before and determined by the New Jersey courts. Of course, the United States District Court complaint attempted to mold the same operative facts and transactions which had undergirded the prior New Jersey Superior Court tort action into a federal civil rights tort. See "Constitutional Tort: Monroe v. Pape, and the Frontier Beyond," 60 *Northwestern University Law Review* 277. But aside from these transparent allegations, if any new or different allegations appear to be set forth in the United States District Court action, these new or different allegations are matters which still pertain to the same operative facts and transactions and, therefore, could or should have been pleaded in the New Jersey action under modern practice, as reflected in the unified single claim for relief doctrine.

The petitioner's action in the United States District Court retained Ellmyer, Apel and LaPlaga as defendants; it dropped the Township of Edison and Miller, McGinnis and Woerner as defendants; and it added as a new defendant, Marie Keller, the individual to whom the petitioner had issued his check, the non-payment of which resulted in his arrest and subsequent criminal proceedings. On March 5, 1968, the defendants Ellmyer, Apel and LaPlaga filed their answers, through their attorneys, Riker, Danzig, Scherer & Brown, and on March 14, 1968, the defendant Keller filed her answer through her attorneys, Meth & Wood.

The answers put into issue the substantial body of allegations of the plaintiff's complaint and, among other things, set forth the separate defense of *res judicata*, estoppel by judgment and statute of limitations.

On September 10, 1968, the defendant Keller noticed a motion for summary judgment. Actually, the motion combined three distinct claims for relief: (i) a motion for summary judgment based upon the grounds that the plaintiff had given his release to the defendant Keller; (ii) a motion to compel plaintiff's attorneys to withdraw from the case; and (iii) a motion to grant the defendant Keller relief by reason of the plaintiff's failure or refusal to timely supply answers to interrogatories. The application to compel plaintiff's counsel to withdraw from the case was based upon the fact that, while plaintiff asserted the release given to Keller was the product of duress [Third Count, ¶28], plaintiff's signature upon the release had been acknowledged under oath as having been voluntarily made and delivered before Mr. Holley, his attorney. Thus, Mr. Holley was an essential witness with respect to the fact question concerning the voluntariness with which plaintiff executed the general release which Mr. Holley had prepared and acknowledged. Further, with regard to the plaintiff's failure to submit to discovery, the motion papers indicated that interrogatories were served upon the plaintiff on or about April 17, 1968, and that answers had not been supplied as of the time the motion was made.

The motion by Keller was reached for argument on October 28, 1968, and at that time the case was in the following posture:

1. It had been pending for some 9½ months since the filing of the complaint on January 3, 1968.

2. All of the defendants had long since filed answers.

3. Efforts to obtain discovery from the plaintiff had been unsuccessful since he had failed and refused to submit answers to interrogatories, despite the fact that they were long overdue.

4. The case had already been noticed for a pretrial conference, and then adjourned by order of the court on September 25, 1968.

5. The defendants Ellmyer, Apel and LaPlaga had retained counsel, who had incurred substantial expense in the defense of the action and in the preparation of a motion for summary judgment, together with supporting brief, which they were about to notice and file.

6. Insofar as the local rules of court were concerned, the plaintiff was still represented by counsel. See *United States District Court, District of New Jersey, Local Rule* 18 ("Unless other counsel is substituted, appearance of counsel shall not be withdrawn except by leave of court in any action.").

On the return of the Keller motion plaintiff's attorneys of record failed to appear although plaintiff was still represented by counsel. *U.S.D.C., N. J., Local Rule* 18. At the start of the proceeding, the court announced that it had received a letter from plaintiff (copies of which were never supplied to defense counsel) expressing the desire that plaintiff wished to "withdraw" his action. Of course, counsel for defendants did not assume that "withdrawal" meant retreat in the face of impending defeat, with a reservation of rights to return to do battle again at any subsequent time found to be propitious by plaintiff. Rather, defendants requested costs as if they were a "prevailing party," (see *Fed. R. Civ. P.* 54,) and they withdrew the request only when it appeared that this would require them to wait in the courtroom in order to be reached for argument and decision on the motion for summary judgment which was pending.

The oral discussions, of course, did not technically result in a dismissal at that time, because it remained for the court to enter a written order of dismissal. On November 8, 1968, the court entered an order which directed that the action "be and is hereby dismissed with prejudice and without costs to any party." Thereafter, and pursuant to *Fed. R. Civ. P.* 77(b), notice of the entry of the final order was mailed to plaintiff's attorneys of record, Holley and Kroner (P4a). Unlike the New Jersey Court Rules (*Rule* 4:42-1), which had no applicability to the District Court action, the Federal Rules of Civil Procedure do not require that there be consent as to form, and consequently the order of dismissal was never submitted to plaintiff or his attorneys for that purpose.

After the entry of the final order of dismissal on November 8, 1968, and before making the motion for relief from the terms of that order (an interval of 19 months), the petitioner then apparently elected to shift his field of battle from a forum where he was about to sustain another defeat to a new forum which he apparently believed held more promise of success—the Committee on Claims of the Joint Legislative Appropriations Committee, State of New Jersey. In short, petitioner was engaged in the practice of starting and stopping litigation based upon his own judgments as to how that litigation appeared to be progressing at the moment and his own rationalizations as to which forum held more promise for success at a particular point in time. He pursued this course of conduct, apparently, because of a belief that our judicial process permits of this practice, and that he would be free to return to the abandoned forum and start anew if he failed in the new forum selected.

Petitioner apparently pursued his claim before the Subcommittee on Claims through to an unsuccessful con-

clusion, and then, unhappy with that result, instituted an entirely new action against the Subcommittee on Claims and the State of New Jersey in the United States District Court for the District of New Jersey, seeking damages under the Civil Rights Act, 42 *U.S.C.* §§1983-1986. Once again, he still apparently claimed relief on the basis of the same operative facts and transactions which had previously been litigated in the State and federal courts. That action was dismissed by the United States District Court, and the appeal was affirmed in a *per curiam* opinion. See *Gambocz* v. *Subcommittee on Claims, et al.,* No. 18315, appeal decided March 26, 1970.

Thereafter, having failed to obtain the relief he sought in seven stages of various proceedings, petitioner sought an order vacating the final order of dismissal which had been entered some 19 months previously, on November 8, 1968. In short, petitioner sought to establish a right to relief on the same operative facts and transactions which had already been adjudicated, in an eighth round of battle:

1. Superior Court of New Jersey, Law Division—adverse decision on the merits following trial.

2. Superior Court of New Jersey, Appellate Division—judgment below affirmed.

3. Supreme Court of New Jersey—petition for certification denied.

4. United States District Court, District of New Jersey (the instant action)—dismissed with prejudice on November 8, 1968.

5. Joint Subcommittee on Claims—claim rejected.

6. United States District Court, District of New Jersey (action against Joint Subcommittee)—dismissed.

7. United States Court of Appeals for the Third Circuit—dismissal affirmed.

Parenthetically, the petitioner has since pursued or instituted the following actions on the basis of the same operative facts and transactions upon which he has previously sought, and been denied, relief in the State and federal courts:

1. United States Court of Appeals for the Third Circuit (the instant action)—dismissal affirmed.

2. United States Court of Appeals for the Third Circuit (the instant action)—petition for rehearing denied.

3. United States District Court, District of New Jersey (action against attorneys who successfully defended petitioner's original action in District Court)—pending.

4. United States District Court, District of New Jersey (action against all parties who were defendants in the original District Court action, together with other parties who could or should have been parties in that action)—pending.

5. Superior Court of New Jersey, Chancery Division (action against Township of Edison for production of employment records of Marie Keller)—pending.

Apparently, petitioner contends that the basic principle of guaranteeing to every citizen one single unified claim for relief, to be pursued in one integrated action through to a final conclusion on the merits, is not adequate to protect his needs; rather, petitioner seems to contend that nothing will be adequate in his case but the achievement of the result he desires, and if this requires litigation *ad infinitum*, then that too should be afforded to him.

ARGUMENT

POINT I

There are no special and important reasons for granting review on certiorari.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." *Rule 19, Supreme Court Rules.* There are no special and important reasons for granting review on certiorari in this case. Accordingly, the petition should be denied.

POINT II

The petition presents no cognizable questions for review.

The questions presented by the petitioner (P2-3) were not raised before nor passed upon by the District Court; they were not raised before nor passed upon by the Circuit Court; they proceed wholly upon erroneous assumptions and inferences of fact; and they are frivolous as a matter of law. Accordingly, the petition should be denied.

POINT III

The District Court (and the Circuit Court, by reason of its affirmance) did not abuse its discretion when it denied petitioner's motion for relief from a final order.

The petitioner's motion of May 11, 1970, although not clearly designated as such, was an application for relief pursuant to *Fed. R. Civ. P.* 60(b), "from a final judgment, order, or proceeding . . ." As such, the application was addressed to the sound discretion of the trial court, the exercise of which should not be disturbed on appeal except in cases of evident abuse. See *Bridoux* v. *Eastern Air Lines,* 214 F. 2d 207 (D. C. Cir. 1954); *Assman* v. *Fleming,* 159 F. 2d 332 (8th Cir. 1947); *Farmers Co-Op.* v. *Strand,* 382 F. 2d 224 (8th Cir. 1967); *Hines* v. *Seaboard Airline R. Co.,* 341 F. 2d 229 (2d Cir. 1965). The discretion of the District Court was most certainly not abused when that court denied the petitioner's application [see *Ackermann* v. *United States,* 304 U. S. 193 (1950); *Rinieri* v. *News Syndicate Co.,* 385 F. 2d 818 (2d Cir. 1967); *Rhodes* v. *Houston,* 258 F. Supp. 546 (D. C. Neb. 1966)], and the discretion of the Circuit Court was most certainly not abused when that Court affirmed the determination of the District Court.

The petitioner's application for relief from the final order was clearly not based upon the grounds in sections (2) (newly discovered evidence), (4) (judgment void) or (5) (judgment satisfied) of Rule 60(b), and the application, whether founded upon the grounds specified in sections (1) (mistake) or (3) (fraud) of the Rule, was clearly barred by the one-year limitation, which could not have been extended by the court. *See, e.g., Ackermann*

v. *United States, supra; Boehm* v. *Office of Alien Property,* 344 F. 2d 194 (D. C. Cir. 1965); *Rhodes* v. *Houston, supra.*

By process of elimination, then, it is apparent that the petitioner relied solely upon Rule 60(b)(6) ("any other reason") as the basis of his application; but that provision had no applicability under the facts and circumstances of this case.

When the petitioner's position with respect to Rule 60 (b)(6) is subjected to careful analysis, it can be distilled into the following proposition: Litigants should be free to start and stop litigation involving the same claim for relief arising out of the same operative facts or transactions against the same parties and those with whom they are in privy for the purpose of enabling themselves to switch their field of battle from one forum to another whenever their own rationalizations indicate that such a switch will work to their advantage and, simultaneously, they should be free to preserve their right to return at a later date to the forum previously abandoned should such a subsequent return prove to be propitious as a result of having encountered failure in the other forum. The well-reasoned opinions in *Ackermann* and *Rinieri, supra,* establish rather conclusively that the relief for "any other reason" provided by Rule 60(b)(6) was not intended to provide relief under such circumstances.

Quite to the contrary, the petitioner's proposition demonstrates why, under all the facts and circumstances, equity and justice now dictate that the Township of Edison, the members of its police department, its municipal court clerk, Mrs. Keller, the Subcommittee on Claims, and the State of New Jersey finally be relieved from the vexacious multiplicity of expensive litigation with which the petitioner has confronted them over the past 5 years.

CONCLUSION

It is respectfully submitted that the policies of the law underlying the single claim for relief doctrine and the finality of judgments doctrine coalesce and mandate that the petitioner should not be granted relief from the final order of November 8, 1968; that the discretion of the District Court in denying that relief was properly exercised; that the discretion of the Circuit Court in affirming the determination of the District Court was properly exercised; and that the petition for review on certiorari, under all of the facts and circumstances, presents no special and important reasons for such review. Accordingly, it is respectfully submitted that the petition for review on certiorari should be denied.

RIKER, DANZIG, SCHERER & BROWN,
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PETER N. PERRETTI, JR.,
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On the Brief.

APPENDIX

Complaint and Demand for Trial by Jury (Re: Superior Court of New Jersey)

(Filed—March 8, 1966)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MIDDLESEX COUNTY

DOCKET No. L-

Civil Action

BILL J. GAMBOCZ,

Plaintiff,

vs.

LILLIAN APEL, LOUIS LA PLAGA, JOHN W. ELLMYER, JR., GEORGE MILLER, RICHARD MCGINNIS, THEODORE C. WOERNER, and THE TOWNSHIP OF EDISON, a municipal corporation,

Defendants.

The Plaintiff, Bill J. Gambocz, residing at No. 1028 Amboy Avenue, in the Township of Edison, County of Middlesex, State of New Jersey, says:

1. On or about the first day of June, 1965, the Plaintiff was elected in a political primary to run for the office

of Mayor of the Defendant, The Township of Edison, in the County of Middlesex, State of New Jersey, then living and maintaining a business in said township for many years and enjoying a good name, the respect of his neighbors, a successful business relation and a favorable standing in the community.

2. The Defendant, Louis La Plaga, is a police officer employed by the Defendant, The Township of Edison.

3. The Defendant, George Miller, is a lieutenant employed on the police force of the Defendant, The Township of Edison.

4. The Defendant, Richard McGinnis, is a police officer employed by the Defendant, The Township of Edison.

5. The Defendant, John W. Ellmyer, Jr., is the Police Chief for the police department in the jurisdiction of the Defendant, The Township of Edison.

6. The Defendant, Theodore C. Woerner, is a police officer employed by the Defendant, The Township of Edison.

7. The Defendant, Lillian Apel, is the Court Clerk for the municipal court, acting in and for the Defendant, The Township of Edison.

FIRST COUNT

8. On or about the 30th day of August, 1965, the Defendant, Louis La Plaga, during and in the course of his employment, did have certain conversations with a person

known as Marie Keller and as a result, the said Defendant, Louis La Plaga, did take a certain $55 check drawn in May of 1964 by the Plaintiff to the police headquarters of the Defendant, The Township of Edison.

9. The said Defendant, Louis La Plaga, did then and there confer with the Defendant, John W. Ellmyer, Jr. and they did agree, maliciously, and in order to pervert the law, that they would attempt to utilize the criminal processes of the courts of the State of New Jersey for the purpose of embarassing the Plaintiff in his standing in the community and injuring his good name, reputation and credit.

10. The Defendant, John W. Ellmyer, Jr., acting for the Defendant, The Township of Edison, in this and all future actions alleged, did thereupon dispatch the Defendant, Louis La Plaga, contrary to the usual processes, in a municipal vehicle to obtain the said Marie Keller and did thereupon transport her to police headquarters.

11. The Defendant, John W. Ellmyer, Jr., did thereupon, on or about the 31st day of August, 1965, maliciously and in order to pervert the criminal processes of the State of New Jersey, advise the said Marie Keller that the only way that she could collect $55 from the Plaintiff, as a civil debt, was to press charges in the form and manner in which she was advised through the police department and the said Defendant, John W. Ellmyer, Jr. did further advise the said Marie Keller, maliciously and as a perversion of the criminal processes that there was only a two year statute of limitations in which to collect the said

money from the Plaintiff paid the money to the said Marie Keller's deceased husband, and that the said Marie Keller should accompany the Defendant, Louis La Plaza, to the office of an attorney at law of the State of New Jersey, who was also attorney for the Board of Adjustment of the Defendant Township of Edison of the Planning Board for the Defendant Township of Edison and from time to time acting Town Attorney and acting Clerk of the Defendant, Township of Edison and who was also campaign manager for the re-election of the incumbent Mayor of the Defendant Township of Edison, who was running in an opposite political party against the Plaintiff in November of 1965.

12. The Defendant, Township of Edison, through its officers and agents caused the said Marie Keller to be driven by police car to the office of R. Joseph Ferenczie, who in turn advised the said Marie Keller, in the presence of the Defendant, Louis La Plaza, not to collect the money from the Plaintiff that she alleged was due but to follow the procedure recommended to her by the Defendants, Louis La Plaza and John W. Ellmyer, Jr.

13. Thereupon the Defendants, John W. Ellmyer, Jr., George Miller and Louis La Plaga, caused the said Marie Keller to give a statement concerning her alleged debt against the Plaintiff and to sign, maliciously, and as a perversion of the processes of criminal procedure in New Jersey a Complaint in blank purporting to be a sworn Complaint before the Defendant, Lillian Apel, who did maliciously and as a perversion of the criminal processes of the State of New Jersey purport to sign a jurat stating

that the said Marie Keller had sworn to said criminal Complaint.

14. The said Defendant, Louis La Plaga and John W. Ellmyer, Jr., in the course of obtaining the said action from the said Marie Keller, did discuss and offer to the said Marie Keller a job as a school crossing guard and to give her applications for that purpose as an additional inducement to carry out their malicious scheme to pervert the processes of justice in New Jersey.

15. Thereafter the Defendant, John W. Ellmyer, Jr. did cause the Defendants, Richard McGinnis and Theodore C. Woerner, maliciously, and as a perversion of the criminal processes of the State of New Jersey, to go to the home of the Plaintiff's elderly mother and father and to announce that the police were searching for their son, so as to cause great pain and suffering, fear, physical suffering, shock and mental anguish to the Plaintiff and his parents, even though the said Defendants knew that the Plaintiff resided and maintained a business at No. 1028 Amboy Avenue, in the Township of Edison, County of Middlesex, State of New Jersey, and had done so for a number of years and lived separate and apart from the said parents and even though the said Defendants knew that the Plaintiff was available and in fact running for public office in the said township and had no reason to search out the Plaintiff other than to embarrass him and cause the aforesaid damage.

16. On or about the 31st day of August, 1965, several newspapers in the vicinity of the Township of Edison did receive anonymous tips as to criminal proceedings being

taken against the Plaintiff but the desk sergeant employed by the Defendant, The Township of Edison, and police headquarters, refused, in the normal and proper course of police proceedings to release any information concerning the same until the Defendant, John W. Ellmyer, Jr., did maliciously and as a perversion of the criminal processes of the State of New Jearsey, telephone the said desk sergeant and order him to make public to the newspapers the confidential statement given against the Plaintiff in a pending criminal matter before the municipal court of the Defendant. The Township of Edison, so as to embarrass the Plaintiff, interfere with his advantageous economic relation, cause him pain and suffering, scorn and ridicule, loss of standing in the community and loss of his good name, fame and credit and otherwise injure him.

17. As a result of the malicious use of the criminal processes of the State of New Jersey by the aforesaid Defendants, the Plaintiff has suffered greatly in his name and reputation, in his business, in his standing in the community, and he has further suffered mental anguish, and he has been forced to incur large legal fees and expenses, and he has been permanently injured in his ability to earn his livelihood as a real estate broker and an insurance broker and in the field of real estate consultation, and he has been injured in his ability to run for or hold public office.

WHEREFORE, the Plaintiff demands judgment against the Defendants, Lillian Apel, Louis La Plaga, John W. Ellmyer, Jr., George Miller, Richard McGinnis, Theodore C. Woerner and the Township of Edison, a municipal cor-

poration, jointly and separately, for compensatory and punitive damages plus costs of suit.

SECOND COUNT

18. The Plaintiff repeats and realleges all of the allegations of the First Count of the Complaint and makes them a part hereof as if more fully set forth.

19. The Defendants, on and about the 30th and 31st days of August, 1965, did meet and conspire together maliciously for the purpose of harming the Plaintiff in his standing in the community, in business relations, opportunity to run for elective office and the like through an abuse of the processes of the municipal court of the Defendant, The Township of Edison, all while the said Defendants were employed and acting within the scope of their employment by the said Defendant, Township of Edison.

20. The said Defendants did do and perform the things and deeds as set forth in the First Count of the Complaint in the course of carrying out the said conspiracy, to maliciously injure the Plaintiff.

WHEREFORE, the Plaintiff demands judgment against the Defendants, Lillian Apel, Louis La Plaga, John W. Ellmyer, Jr., George Miller, Richard McGinnis, Theodore C. Woerner and the Township of Edison, a municipal corporation, jointly and separately, for compensatory and punitive damages plus costs of suit.

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By LEE A. HOLLEY, ESQ.

Complaint and Demand for Trial by Jury
(Re: Superior Court of New Jersey)

The Plaintiff herein demands and requests trial by jury on all issues in this Complaint.

HOLLEY ANI KRONER, ESQS.
By LEE A. HOLLEY, ESQ.

Dated: March 4, 1966

Complaint and Demand for Trial by Jury (Re: United States District Court)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CASE NO.

Civil Action

BILL J. GAMBOCZ,

Plaintiff,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER,

Defendants.

The Plaintiff, Bill J. Gambocz, residing at 526 Jacques Street, in the City of Perth Amboy, County of Middlesex, State of New Jersey, says:

1. This court has jurisdiction over the subject matter of this suit, pursuant to the provisions of §1983 and §1985 of Title 42, United States Code, and §1331 and §1343 of Title 28, United States Code.

2. The matters in controversy arise under the Constitution of the United States and exceed the sum of Ten Thousand ($10,000) Dollars, exclusive of interest and costs of suit.

Complaint and Demand for Trial by Jury
(Re: United States District Court)

FIRST COUNT

3. In and about the month of June, 1965, the Plaintiff, Bill J. Gambocz, was duly elected in a primary election to run for the office of Mayor of the Township of Edison, New Jersey, as a Republican candidate.

4. Thereafter, the Plaintiff commenced, pursuant to his rights of free speech, assembly and political freedom guaranteed to him by the United States Constitution, to wage a vigorous campaign against the incumbent Democratic administration of Edison, New Jersey.

5. The Plaintiff was then living and maintaining a business within said Township of Edison, as he had been doing for many years, where he enjoyed a good name, the respect of his neighbors, successful business relations and a favorable standing in the community.

6. The Defendants, John W. Ellmyer, Jr. and Louis La Plaga, respectively Chief and Patrolman, are and were during all pertinent times, members of the Police Department of the Township of Edison, which department was maintained under the control of the political opponent of Plaintiff, and said Defendants committed all acts pertinent herein under color of law and authority of the State of New Jersey.

7. The Defendant, Lillian Apel, is and was during all pertinent times Court Clerk of the Municipal Court of the Township of Edison, having been appointed to said position by the local magistrate, which court was appointed by the opponent of Plaintiff, and in fact was a person al-

leged by Plaintiff in public pronouncements pursuant to his rights of free speech as a citizen of the United States to have direct or indirect interest in certain improper land dealings with the Township of Edison.

8. On or about the 30th day of August, 1965 the Defendant did meet and confer with the Defendant, Marie Keller, who was a private citizen and widow of one Leroy Keller, the latter being a deceased close friend Plaintiff and holder of an unpaid $55 check written in May of 1964 for a past consideration.

9. As a result of said meeting, the Defendants, Louis La Plaga and John W. Ellmyer, Jr. did meet and confer, and on or about the 30th and 31st days of August did unlawfully conspire for the purpose of injuring Plaintiff to impede, hinder, obstruct and defeat the true course of justice, to deny Plaintiff equal protection of law, to injure Plaintiff in his person and property by arbitrary and discriminatory acts under color of law and authority, to deny Plaintiff his constitutional rights of free speech, assembly and political freedom, to cause criminal processes and incarceration for the mere owing of civil debts, to utilize the powers of the State of New Jersey to deny political freedom of Plaintiff to run for office and citizens of Edison to have a *bona fide* general election, and to deny Plaintiff in criminal matters due process of law and equal privilege and immunities of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

10. Pursuant to said conspiracy, the said Defendants, John W. Ellmyer, Jr. and Louis La Plaga did contrive to send Louis La Plaga to the home of the Defendant, Marie

Keller, in order to induce her to come to police headquarters to file a criminal complaint, under color of law and state authority, and to cause criminal processes and incarceration to be undertaken for mere civil indebtedness and for no criminal action.

11. The said Defendants thereupon did contrive to get Defendant Marie Keller, to join their illegal conspiracy by having her wrongfully undertake to utilize the criminal processes of the State of New Jersey as a way of extorting from the Plaintiff $55 which he alleged he did not owe, or alternatively, said Defendant, John W. Ellmyer, Jr. did falsely and fraudulently conceal from Defendant, Marie Keller, the criminal nature of proceedings.

12. On or about the 31st day of August, 1965, the Defendant Marie Keller, did join in and assist the Defendants, Louis La Plaga and John W. Ellmyer, Jr. in the illegal conspiracy, following inducements of discussions of a part time job for the said Marie Keller, advice concerning law from John M. Ellmyer, Jr., and a conference arranged by the said Louis La Plaga and John W. Ellmyer, Jr., with Joseph Ferenzi, Esq., attorney and clerk for the said Township of Edison and campaign manager of Plaintiff's opponent, the incumbent Democratic Mayor, all of which was designed to induce and did effect an improper criminal process to be issued and prosecuted against Plaintiff.

13. On or about the 31st day of August, 1965, the Defendant, Lillian Apel, did join the other said Defendants in the aforesaid conspiracy, for the above purposes, and

said Defendants did cause and procure, or assist in causing and procuring the issuance of a criminal complaint and warrant, unsupported by oath or affirmation, contrary to due process of law, equal protection of law, and the privileges and immunities of a United States' citizen as guaranteed by the Fourteenth Amendment of the United States Constitution.

14. Pursuant to said illegal warrant, the Defendants caused police officers to go to the home of Plaintiff's aged parents, out of the jurisdiction of the said Edison police force, without probable cause, and so as to further the above purposes of the conspiracy, and to retaliate against Plaintiff's exercise of his rights and to "teach" him not to act freely, and as a result thereof, Plaintiff was greatly injured in his relations with his father and mother, and in particular, Plaintiff was deprived of the companionship of his father, thereafter, who was rendered into such a state of shock as to cease further communications with Plaintiffs and others, and to become greatly impaired physically, thereby causing Plaintiff great mental anguish and suffering.

15. Pursuant to said illegal conspiracy, for the aforesaid illegal purposes, Defendants caused or allowed, contrary to due process of law, equal protection of law, and the privileges and immunities of a United States citizen. all as secured by the Fourteenth Amendment to the United States Constitution, and specifically contrary to Plaintiff's right to have his criminal rights determined in an atmosphere of calm and free from undue publicity and partisan *ex parte* condemnation, the release of the state-

ment of Defendant, Marie Keller, given to the Edison Police as to the press on the very day of obtaining the same, along with other pertinent facts regarding the entire illegal prosecution.

16. As part of the aforesaid conspiracy, Defendants procured the criminal complaint, with artifice and tricks, using police-state tactics, and caused the said Marie Keller to sign a blank complaint without any understanding or knowledge of the crime charged, the elements involved in said crime, and without having suggested to said Defendants, as police or court personnel, facts to support the crime charged, and without the usual procedures or investigations utilized in said cases regarding an unsatisfied check, given for past consideration, without protest, and issued when ample funds were upon deposit, so as to deprive Plaintiff of any accuser of a crime of which he was in fact accused, contrary to the Fourteenth Amendment of the United States Constitution.

17. As part of the aforesaid conspiracy, the Defendants caused the Plaintiff to be brought before a co-conspirator, or one who joined in the said conspiracy, but who is not made a party herein by reason of the doctrine of judicial immunity, Andrew Desmond, Esq., acting as Magistrate of the Municipal Court of the Township of Edison, who refused to dismiss the illegal complaint, without due process of law, equal protection of law, and the privileges and immunities guaranteed to the Plaintiff under the United States Constitution, but rather through bias, prejudice and an intent and purpose to further the aforesaid conspiracy, so as to mislead the public into believing that

Plaintiff had defrauded the Defendant, Marie Keller, without probable cause.

18. Pursuant to the aforesaid conspiracy, the Defendant, John W. Ellmyer, Jr. refused to allow the Defendant, Marie Keller, to dismiss her complaint, upon her discovery of the illegal purpose and scheme, and, instead, the said Defendant did thereafter undertake efforts to see that the illegal complaint and charges were not dismissed prior to the general election in November, 1965, and undertook certain efforts in that regard, known to Plaintiff, and, in fact, the said illegal complaint was not presented to the Middlesex County Grand Jury in regular order for dismissal but was held until after the Plaintiff was defeated at the polls for the dismissal in due course of said illegal and void complaint, upon other unknown and immune persons joining in the said conspiracy, and following said general election the illegal, void and unsupported criminal complaint was rejected for indictment by the Grand Jury.

19. As a result of the aforesaid conspiracy the Plaintiff was in fact denied rights guaranteed to him pursuant to the Fourteenth Amendment to the United States Constitution, was subjected to a criminal complaint and warrant unsupported by oath and affirmation, was deprived of a judicial tribunal free of bias, prejudice and corruption, was denied criminal processes free from police state tactics and free from political motivation and control, was further denied criminal processes uncorrupted by intentional prejudicial and undue publicity, and was further subjected to a void, fraudulent criminal attack and arrest.

was further arrested and imprisoned for a mere alleged civil debt without any charge of criminal conduct, all of which injured Plaintiff greatly in his name and reputations, in his business, in his standing in the community, in his relationship with his family and friends, in his mental health, and in his advantageous economic relationships and prospective profits, and all of which caused Plaintiff to suffer great mental anguish and shame, forced Plaintiff to undergo large legal expenses and fees and court costs, has permanently injured Plaintiff in his ability to continue to earn a living as a trusted real estate broker, insurance broker and real estate appraiser and consultant and in his ability to participate in community affairs and run for public office, has caused Plaintiff to lose credit forcing him to lose over Three Hundred Thousand Dollars in business loans and debts and to lose additional prospective profits, has prevented Plaintiff permanently from obtaining gainful employment or professional standing and has caused Plaintiff to suffer the loss of his valuable business and residential real estate and personal property.

WHEREFORE, the Plaintiff demands judgment against the Defendants, John W. Ellmyer, Jr., Lillian Apel, Louis La Plaga and Marie Keller, jointly and severally, for compensatory and punitive damages, plus costs of suit.

SECOND COUNT

20. The Plaintiff repeats and realleges all of Paragraphs 1 through 19 of the First Count and makes them a part hereof as if more fully set forth.

Complaint and Demand for Trial by Jury
(Re: United States District Court)

21. The Defendants, Lillian Apel and John W. Ellmyer, Jr., under color of law and authority of the State of New Jersey, and pursuant to the custom, uses and regulations thereunder, did subject Plaintiff or cause Plaintiff to be so subjected, as a citizen of these United States, to a deprivation of rights guaranteed to him by the Fourteenth Amendment of the United States Constitution, to wit, of his right to only be subjected to a warrant supported by oath or affirmation; of his right to be confronted by his accuser through the use of a blank, unsworn criminal complaint, of his right to be arrested and imprisoned for the mere allegation of a civil debt; of his right to be free of bias, prejudice, corruption and political acts or police-state acts in the criminal processes of the State of New Jersey; of his right to have his aged parents left undisturbed in the sanctuary of their home, free from retaliatory and fear provoking acts resulting from Plaintiff's free exercise of speech and political activities; of his right to speak, assemble and exercise political acts freely and without arbitrary discrimination, and insidious totalitarian tactics.

22. The said Defendants did accomplish or assist in accomplishing the aforesaid corrupt, political and discriminatory acts and deeds, arbitrarily and as an abuse of their offices so as to deny Plaintiff due process of law, equal protection, privileges and immunities of law as so secured to Plaintiff as a citizen of these United States.

WHEREFORE, The Plaintiff demands judgment against the Defendants, Lillian Apel and John W. Ellmyer, Jr., jointly and severally, for compensatory and punitive damages, plus costs of suit.

Complaint and Demand for Trial by Jury
(Re: United States District Court)

THIRD COUNT

23. The Plaintiff repeats and realleges all of the allegations of Paragraphs 1 through 22 above and makes them a part hereof as if more fully set forth.

24. On or about the 31st day of August, 1961 the Defendant, Marie Keller, did declare and agree that she did not intend or desire, nor did he understand the nature of the criminal acts taken against the Plaintiff but she did all acts only for the purpose of collecting $55 from the Plaintiff which she alleged was owing to her deceased husband, and sought merely in all acts to obtain the sum of $55 from Plaintiff, especially in view of a recent loss to her automobile, unrelated to Plaintiff.

25. The Defendants, Lillian Apel, Louis La Plaga and John W. Ellmyer, Jr., did join and conspire with the Defendant, Marie Keller, for their own illegal and corrupt purposes but did assist her in her improper and illegal acts as hereafter alleged.

26. The Defendant, Marie Keller, pursuant to the illegal conspiracy, as aforesaid, did falsely, maliciously and without probable cause, institute criminal proceedings against Plaintiff, on or about the 31st day of August, 1965.

27. The said proceedings terminated in favor of Plaintiff in or about the month of November, 1965.

28. The said Defendant, Marie Keller, did coerce and force Plaintiff, without consideration and under duress of further embarassing Plaintiff publicly and further attempt-

ing to procure criminal proceedings, to execute a release in her favor, barring Plaintiff from any legal action against her, and Plaintiff did execute and deliver such a release, involuntarily, but under the coercion, duress and unconscionable conduct of said Defendants.

WHEREFORE, the Plaintiff demands judgment against the Defendants, Marie Keller, Lillian Apel, Louis La Plaga, and John W. Ellmyer, Jr., as follows:

(a) ordering and adjudging that any release given by Plaintiff to Marie Keller be rescinded and the same be and declared to be null and void;

(b) ordering judgment generally for compensatory and punitive damages plus costs of suit.

FOURTH COUNT

29. The Plaintiff repeats and realleges all of the allegations of Paragraphs 1 through 22 above and makes them a part hereof as if more fully set forth.

30. The Defendants, Lillian Apel, Louis La Plaga and John W. Ellmyer, Jr., acted pursuant to the aforesaid conspiracy, in a manner similar to action undertaken against prior minority candidates against the incumbents, and so as to interfere maliciously with the performance of Plaintiff's business as a real estate broker, insurance broker, and real estate investor, about which all said Defendants had knowledge, and further, so as to interfere maliciously with the prospective economic advantages held by Plaintiff, reasonably, under his circumstances.

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31. The acts and deeds of said conspiracy did so interfere maliciously, causing the damage as aforesaid.

WHEREFORE, the Plaintiff demands judgment against the Defendants, Lillian Apel, Louis La Plaga and John W. Ellmyer, Jr., jointly and severally, for compensatory and punitive damages, plus costs of suit.

HOLLEY AND KRONER
Attorneys for Plaintiff
By LEE A. HOLLEY, ESQ.

The Plaintiff hereby requests and demands trial by jury on all issues in this matter, as pleaded or to be pleaded.

LEE A. HOLLEY, ESQ.